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IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-766

JOSEPH CALABRO,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the court of appeals entered on September 21, 1972.

OPINIONS BELOW.

The opinion of the court of appeals (not yet reported) is reprinted in the Appendix, *infra*, pp. A1-A26. The memorandum of the district court denying petitioner's motion to set aside the verdict appears at Appendix, *infra*, pp. A29-A35.

JURISDICTION.

The judgment of the court of appeals was entered on September 21, 1972 (Appendix, *infra*, p. A27). A timely petition for rehearing was denied by orders entered on October 30, 1972 (Appendix, *infra*, p. A28). This Court's jurisdiction is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED.

Late in the evening, after the jury had begun its deliberations in his case, petitioner's counsel was stricken in the courtroom and removed to a hospital. Despite petitioner's expression of concern that he was without his counsel, the court decided that the proceedings should go forward without interruption. Later that night, the trial judge delivered a supplemental instruction and received the jury's verdict finding petitioner guilty of the charge against him.

The question presented is whether petitioner's conviction is void because he was unrepresented by counsel during critical stages of the trial.

CONSTITUTIONAL PROVISION INVOLVED.

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT.

Petitioner, together with a number of other defendants, was charged with conspiring to forge and utter United States bonds and postal money orders and with substantive counts of forging and uttering government paper. The substantive counts against petitioner were dismissed at the outset of trial, but he was convicted of the crime of conspiracy (18 U. S. C. 371) and sentenced to five years' imprisonment and a fine of $10,000.

The facts relevant to petitioner's Sixth Amendment claim may be summarized as follows.

On the morning of January 28, 1972, after several weeks of proceedings, the trial court charged the jury and the jury retired for its deliberations. Shortly after 10:00 p.m. that evening, while the jury was still out, petitioner's trial counsel, Joseph Aronstein, Esq., collapsed in the courtroom. He was given emergency treatment and removed to a hospital at approximately 10:45 p.m. The trial court (Mishler, Chief Judge) discussed the situation thus created with the petitioner and with Assistant United States Attorney Coonon. The full colloquy is as follows (Cal. App. 145-146 [1]):

> THE COURT: I do not know whether the record has noted that Mr. Aronstein suffered a heart attack and has been taken to Long Island College Hospital. I do not know what effect this has on the defendant Calabro.
>
> What do you say, Mr. Coonan?
>
> MR. COONAN: Your Honor, at this point I would suggest it is up to Mr. Calabro whether he would be adequately represented by another attorney to present the material that the jury requires.

1. "Cal. App." refers to the appendix filed by petitioner Calabro in the court of appeals.

THE COURT: Do you want to answer that question, Mr. Calabro?

THE DEFENDANT CALABRO: The best way I can. Does the Court feel it is fair if I had another attorney at this point—at this time?

THE COURT: Sure, I do. There may be nothing else for an attorney to do but take the verdict.

THE DEFENDANT CALABRO: That's the Court's decision but it isn't mine.

THE COURT: What is yours?

THE DEFENDANT CALABRO: I couldn't say. Joe has been with us for four weeks. I don't know really.

THE COURT: All right, I have your opinion. I certainly would not sever on that statement, Mr. Coonan, because you are bound to have a double jeopardy claim.

Having decided that the proceedings should go forward without interruption, the court thereupon issued a supplemental instruction to the jury while petitioner was unrepresented. That instruction was delivered in response to a note received from the jury stating (Cal. App. 147), "There is still some confusion *re* whether or not a person can be found not guilty in the conspiracy charge while at the same time be found guilty in some of the substantive charges." The jury had posed the same question at an earlier point, when petitioner was represented. At that point, petitioner's counsel had suggested a modification of the judge's proposed response and the judge had accepted that modification. The supplemental instruction subsequently given substantially repeated the earlier instruction. Appendix, *infra*, pp. A24-A25; Cal. App. 147-8; 52.

At 11:20 p.m., the jury returned its verdict. The judge polled the jury on the verdict and advised petitioner to obtain counsel before the date of sentencing. Appendix, *infra,* p. A23.

Petitioner unsuccessfully moved to set aside the verdict on the ground that he had been unrepresented at critical stages of his trial. The motion was denied on February 18, 1972 and petitioner was sentenced the same day. Notice of appeal was filed on February 25, 1972.

The court of appeals affirmed. Although it found no support for the government's suggestion that petitioner had waived his right to counsel, it concluded that in the circumstances petitioner had not been prejudiced by the lack of representation. Appendix, *infra,* pp. A24-A26.

REASONS FOR GRANTING THE WRIT.

1. The decision below conflicts with the views adopted by the Sixth and Tenth Circuits in *United States v. Smith*, 411 F. 2d 733 (6th Cir. 1969), and *Thomas v. Hunter*, 153 F. 2d 834 (10th Cir. 1946). The Second Circuit's effort to distinguish those cases evaporates upon examination. Moreover, we note that the court below stated, in commenting on *Smith*, that "to the extent it is not [distinguishable] we decline to follow that holding" (Appendix, *infra*, p. A26).

A. In *Smith* the defendant was "represented competently" by counsel "up to the point of the return of the jury verdict" (411 F. 2d at 734). At the point, however, when the jury was ready to return the verdict counsel was ill and unavailable. The trial judge nonetheless received the jury's verdict of guilt. As in the instant case, the judge thereupon polled the jury. The court of appeals ruled that the return of the verdict is "the pinnacle of the trial" and certainly "a critical stage" (411 F. 2d at 736). The fact that the trial judge polled the jury, it continued, "does not negate the possibility of prejudice to the defendant" (*ibid*). "From a reading of the record it is impossible to determine the tone of voice of the jurors when they individually announce their decision, the hesitancy of their responses, and other possibilities that could have taken place and had significant meaning. Had counsel been present and something of this nature occurred, the defendant would have had the benefit of his legal advice." 411 F. 2d at 736-7.

The Second Circuit suggests that the instant case may be distinguishable because the defendant in *Smith* was tried alone, whereas here the lawyers representing other defendants were present. The short answer is that the Sixth Amendment right to be represented by counsel is a per-

sonal right and that its effective exercise may not be made to depend upon the vigilance or perceptiveness of counsel representing other jointly tried defendants.

The court below offers another distinction. Although it acknowledges that petitioner did not waive counsel, it says that the trial judge made "clear that he could get another attorney" and that this "must have alerted him to be protective of his rights" (Appendix, *infra*, p. A26). The trial court, however, did not continue the case until the next day, a measure that would have afforded petitioner time to consider and consult.[2] Petitioner can hardly be faulted for being at a loss as to how to proceed and it is scarcely realistic to suggest that then and there, at 10:45 p.m., he might have procured new counsel. But, in all events, assuming the petitioner was indeed "alerted" that he should be "protective of his rights," what possible basis is there for inferring that petitioner, an untrained layman, was cognizant of his rights or qualified to exercise them?

Petitioner's case is in fact stronger than that of the defendant in *Smith*. As pointed out in the Statement, he was also unrepresented when the court gave a supplemental instruction in response to the jury's query whether an acquittal on a conspiracy count would be consistent with a finding of guilt on a substantive count. It is true, as the court of appeals observes, that the substantive counts against petitioner had been dropped and that only the conspiracy count remained when the jury retired. That, however, does not warrant an inference that the matter was of no moment to petitioner. The question of the relationship

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2. Had the court adjourned the proceedings until the following day instead of pushing it to conclusion that night, petitioner, as events proved, would have been enabled to consult with his trial counsel. Mr. Aronstein was in fact released from the hospital several hours after his attack. Cal. App. 60.

between conspiracy and a charge of substantive offenses is one which involves an understanding of the nature of conspiracy. It might have appeared necessary or appropriate to petitioner's counsel, had he been present, to suggest modifications in the language of the court's proposed response to the jury. Or he might have found it appropriate to request the court to remind the jury of earlier instructions given in relation to the offense of conspiracy. The fact that the instruction given was not erroneous does not, of course, dispose of the point that counsel might properly have sought something more by way of explanation or elaboration to safeguard his client from the potential consequences of the jury's evident confusion.

The court of appeals says further that petitioner's counsel had his "say" at an earlier stage when the jury made a similar request for a supplementary instruction, and that the judge at that point followed counsel's suggestion. Appendix, *infra*, pp. A24-A25. This shows, in our view, that the subject matter of the request was not a matter of indifference to petitioner's counsel and it indicates further that the trial judge did not so regard it. It does *not* show that petitioner's counsel, had he been present when the jury, still confused, raised the matter a second time, would have had nothing further to suggest or to add.

B. In *Thomas v. Hunter*, a judgment of conviction was collaterally challenged by a petition for *habeas corpus* which alleged that petitioner's counsel was excused from the courtroom by the judge while the jury was out and that counsel was still absent when the verdict was returned. The trial record neither proved nor disproved the allegation. On appeal from a judgment denying the *habeas* petition, the Tenth Circuit reversed and directed the district court to permit the petitioner to testify in support of his

allegation. In the instant case, the court below dismisses the decision in *Thomas v. Hunter* with the comment that in that case the court was disturbed by "the possibility of prejudice deriving from absence of polling" (Appendix, *infra*, p. A25).

This is a palpable misreading of the Tenth Circuit's opinion. As the *Thomas* case came to the Tenth Circuit, there was no indication, one way or the other, whether the jury had been polled. The holding of the case is that petitioner would be entitled to relief if he established on remand that he had not waived counsel and that counsel was in fact absent when the verdict was returned. The opinion declares that "the return of the verdict is an important step in the trial, at which the defendant needs the guiding hand of competent counsel" and that he "has the right and privilege of polling the jury" (153 F. 2d at 839). The court then noted its *dis*agreement with a Fifth Circuit decision indicating that polling of the jury by a judge might constitute adequate representation of the defendant upon return of the verdict. Speaking for the court, Judge Huxman stated (pp. 839-40):

> Assuming that a court can adequately represent the defendant at any step of a contested criminal trial, that is not a substitute for, nor can it be taken in satisfaction of, the constitutional requirement that one charged with crime is entitled to the benefit of counsel who will devote his undivided energies solely and exclusively to the performance of these functions.

In short, it is the rule of the Tenth Circuit that the right of the defendant to exercise his prerogatives when the verdict is returned is a personal right and cannot be satisfied, in the absence of a knowing waiver, by the trial judge or by someone else's lawyer.

The conflict among the circuits is plain.

2. This Court has not faced the precise question at bar—the consequences of counsel's involuntary absence when a supplementary instruction is delivered to the jury or when the jury's verdict is returned. Yet the thrust of its decisions seems unmistakable.

As early as *Powell v. Alabama*, 287 U. S. 45, 68 (1932), the Court emphasized that a defendant "requires the guiding hand of counsel at every step in the proceeding."[3] That right to assistance of counsel, it stated in *Glasser v. United States*, 315 U. S. 60, 76 (1942), is "too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." In *Gideon v. Wainwright*, 372 U. S. 335 (1963), the Court ruled that a State court's conviction of an indigent defendant for commission of a felony could not stand where the State had failed to provide him an attorney, and that it would permit no speculation on the question whether in a particular case the presence of a lawyer would have made a difference in the result. In *Chapman v. California*, 386 U. S. 18, 24 (1967), the Court addressed itself to the circumstances in which a federal constitutional error can be held harmless. The opinion declares (p. 23) that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error . . ." Among these are the "right to counsel" (p. 23, n. 8).[4] It remains only to add that when there is a con-

3. See, also, *Moore v. Michigan*, 355 U. S. 155 (1957), and *Mempa v. Rhay*, 389 U. S. 128 (1967).

4. It may be assumed that the principle is less than absolute when the infraction takes place in a preliminary proceeding rather than the trial itself. See *Coleman v. Alabama*, 399 U. S. 1 (1970). The Court, however, has tolerated no departure from the principle of *Gideon* when there is an absence of counsel at trial. On the contrary, the principle has been extended to cases involving imprisonment for offenses of lesser gravity than felonies. *Argersinger v. Hamlin*, 92 S. Ct. 2006 (1972).

stitutional right to be assisted by counsel it is the "unqualified" right of the defendant "to be heard through his own counsel," *Chandler v. Fretag*, 348 U. S. 3, 9 (1954).

CONCLUSION.

The decision below is in plain conflict with decisions of two other circuits. It also departs from principles repeatedly enunciated by this Court. This petition should accordingly be granted.

Respectfully submitted,

RALPH S. SPRITZER,
Counsel for Petitioner.

November, 1972.

Appendix.

(1) OPINION OF THE COURT OF APPEALS.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 835, 839-41, 846-49—September Term, 1971.
(Argued June 30, 1972 Decided September 21, 1972.)
Docket Nos. 72-1203, 72-1211-17

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH CALABRO, LEONARD CONFORTI, JOHN CONFORTI, ANTHONY TORTORELLO, ANTHONY PICCIANO, RICHARD PASQUA, JOHN ROCHE and MARC MOSKOWITZ,

Appellants.

Before:

MOORE, SMITH and TIMBERS,

Circuit Judges.

SMITH, *Circuit Judge:*

The testimony at this lengthy, multi-defendant trial revealed the existence of a large, well-organized, long-term scheme to "pass dirty paper," that is, to forge and cash stolen obligations of various sorts in and around the New York area. Each of the eight appellants was convicted on one or more counts of forging and uttering United States Series E Savings Bonds and United States postal money orders, in violation of 18 U. S. C. § 495 or of conspiring to commit those offenses, in violation of 18 U. S. C. § 371,

after a trial by jury in the United States District Court for the Eastern District of New York (Jacob Mishler, *Chief Judge.*) [1] Seven of the appellants were sentenced to terms of imprisonment, ranging in length from a year and a day to ten years; one was placed on probation.[2] Two co-defendants, Charles Graham and Richard Marabetti, pleaded guilty and testified for the government at trial. A ninth co-defendant found guilty, Joseph Chilli, did not appeal. Certain of the defendants claim that the evidence was insufficient to convict them, and all claim that numerous errors, some of constitutional magnitude, occurred during the course of the trial. We find that none of the claims warrants reversal and affirm the judgment below.

---

1. The first count charged all defendants with conspiracy to violate 18 U. S. C. § 495 "by conspiring and agreeing to forge and to utter and publish as true U. S. Series E Savings Bonds and United States Postal Money Orders, with intent to defraud the United States, knowing the same to have been falsely made and forged." There were twenty-six paired counts (numbers two through twenty-seven) under § 495, charging, respectively, the forging and uttering of specific instruments; counts two and three specified four postal money orders and the others named specific Series E Savings Bonds. A twenty-eighth count charging John Conforti and his wife Loretta with a violation of 18 U. S. C. § 494 was dismissed by the court for lack of evidence.

All of the appellants except Anthony Tortorello were convicted on the conspiracy count. Leonard Conforti, named in all twenty-six substantive counts; John Conforti, named in fourteen, Marc Moskowitz, in six and Anthony Picciano, in two, were convicted on all counts charged. Tortorello was acquitted on eighteen of the twenty-four substantive counts in which he was named and John Roche was acquitted on two of the eight in which he was charged. Joseph Calabro, charged on two substantive counts dismissed at the start of the goverment's case, and Richard Pasqua were convicted of conspiracy only.

2. Leonard Conforti, John Conforti, and John Roche were sentenced to ten years imprisonment; Leonard was also fined $26,000. Joseph Calabro was sentenced to a five-year prison term and was fined $10,000. Richard Pasqua and Marc Moskowitz were each sentenced to five-year terms; Anthony Tortorello was sentenced to a year and a day, and Anthony Picciano was placed on probation.

I. The Facts

The testimony, primarily by Graham and Marabetti, long-time accomplices of the defendants, and by Martha Lane, Faye Rushford, Marie Matthews, and Carol Rabinow, women who played a more fleeting role in the organization, revealed that Leonard Conforti (sometimes referred to herein as "Leonard") and Steven Insalaco (a co-defendant who pleaded guilty during trial and whose case was then severed) were managers of a large "business" which forged and uttered stolen obligations; this indictment covers transactions in postal money orders and valid executed and blank unexecuted Series E Savings Bonds. The organization was multi-leveled; at the top were Leonard and Insalaco, who directed the operation and took a percentage of all proceeds from the cashing of the bonds and money orders. Most of the paper was purchased outright or on consignment from Joseph Calabro, though some drifted in from other sources. Calabro was referred to by Leonard and Insalaco as "the boss," who got "a cut of all the action." The middle level in the organization was comprised of "managers," who recruited the men or women who did the actual passing, supervised their activity, and were responsible for their profits. Marabetti was active at this level, operating mainly in New Jersey; Graham, Richard Pasqua and John Roche worked in New York. John Conforti had a position somewhere between this level and the higher one; though he entered the conspiracy later than the others, he was being primed for a leadership role in the enterprise.

The "movers" or "workers," who did the actual cashing of the bonds, were generally young women, although men, such as Marc Moskowitz, were also employed. Faye Rushford, Martha Lane, Marie Matthews, and Carol Rabinow, four such "movers" who testified at trial, were

sometimes paid a percentage of the amounts they cashed (10-15%) and sometimes received a stated amount for a day of cashing activity. The managers then took their share of the proceeds (from 10 to 35% depending on the person involved and the circumstances of the transaction) and passed the remainder on to Leonard and Insalaco. When the bonds were received on consignment, the supplier would be paid a percentage of the cash realized; Calabro took 17% on those obligations he supplied. To facilitate the passing of the obligations, Leonard and Insalaco purchased and supplied the managers with bogus identification papers, such as driver's licenses, draft cards, and Social Security cards; the major source of such papers was Tortorello, though Picciano also supplied some bogus identification.

The conspiracy was alleged to have run from July 1, 1966 to the filing of the indictment on March 11, 1970. Most of the incidents testified to occurred during 1967 and 1968; there was, however, proof of three episodes of cashing Savings Bonds during the summer of 1966. Michael Conforti, another brother of Leonard and John, Steven Insalaco, and Carol Rabinow were involved in those incidents. The bonds were cashed in banks in New York City; Rabinow, who did the actual cashing, received 10% of the proceeds and passed the rest to Conforti or Insalaco. Rabinow was arrested in late summer of 1966 and her involvemnet with the group ended at that point.

The next major series of transactions testified to occurred a year later, in the fall of 1967. In October of that year, Leonard Conforti learned of the possibility of purchasing stolen postal money orders; he and Insalaco approached Marabetti with an offer to work together cashing the orders. Leonard bought the obligations, which had been stolen from a Groveville, New Jersey post office, and the

stamping machine necessary to validate them, and the three commenced forging and cashing them. Martha Lane, the woman who worked for Marabetti and actually cashed the forged orders, testified that the cashing forays began at the Black Eagle Social Club, on 31st Street in Brooklyn, the central location for the group's activities at this time. She would depart from there, generally with Marabetti, and often with Pasqua or Roche too, and drive to a series of retail stores, at each of which she would buy $20-$30 of merchandise and pay with a forged $100 money order. She was given false identification by Leonard Conforti before she left the club and returned it to him after each trip. On returning to the Black Eagle, she gave the proceeds of the cashing to Leonard, Insalaco or Marabetti; when the merchandise purchased was liquor, it was generally used in the club. The money order activities were brought to an abrupt halt when Lane was arrested in Bergenfield, New Jersey on December 10, 1967.

Lane was immediately released on bail and testified that she was present at a conversation the day after her arrest in which Leonard and Insalaco discussed with Marabetti the possibility of venturing into United States Series E Savings Bonds instead of continuing with money orders. Marabetti and a partner of his, John Collerone, worked with Leonard, Insalaco and Pasqua during most of 1968, cashing such bonds at banks. Martha Lane, who cashed several thousand dollars worth of these bonds with Marabetti through May of 1968, testified to numerous cashing expenditions onto Long Island and in the areas surrounding New York City. During this period, she saw Calabro, described to her by Roche as "an associate of Leo and Steve's," at the Black Eagle on one occasion.

At the same time, Graham, who had been recruited in January of 1968, was building an organization of his own

which also moved forged bonds dispensed by Leonard. The bonds cashed during this period were valid executed bonds stolen from the true owners and purchased from Calabro, and the "movers" forged the endorsements of the true owners when they cashed the bonds. Graham continued to work with Leonard and Insalaco during the summer of 1968, and at that time, John Conforti was first linked with the cashing activities. In the early fall, John allowed Leonard and others to use his house for typing blank bonds and apparently did some typing himself. Faye Rushford, a waitress who had come to New York in early fall on Leonard's invitation to work in Nero's Nook, a bar he operated which many of the appellants frequented, testified that John told her, a week after her arrival at the start of October, that "We steal for a living. We get bonds."

During October Leonard reportedly told Graham to teach John the business, and John recruited Rushford to work with Graham and himself. In October, Rushfold cashed bonds with Graham several times, and in December, John and Graham completed the cashing of a large number of blank bonds stolen from a post office in California. Graham testified that the identification used to facilitate the cashing of several series of the bonds moved in late 1968 and listed in the indictment was supplied by Tortorello. In January of 1969, John and Graham took several trips—to Pennsylvania to collect money from Moskowitz, who had been cashing bonds there, and to Boston to investigate the possibility of establishing operations there. During that same month, Leonard told Graham to make John his partner; they were to split the profits equally.

The last set of ventures probed at trial occurred during the fall of 1969. Marie Matthews met Pasqua and Leonard at this time and worked with them on several occasions

cashing bonds in banks on the west side of Manhattan; she testified that she earned about $3,000, which was 15% of the total proceeds of the work, in her 20 to 30 trips with Leonard and Pasqua. Matthews was arrested on December 4, 1969.

Finally, Marabetti testified that when he was released from jail in January of 1970, having completed a term on a related charged, he met with Leonard who told him that if he wanted to do any more work in the "bond business," he should see John, who was taking it over for Leonard.

II. Sufficiency of the Evidence.

Three appellants challenged the sufficiency of the evidence to support their convictions. Preliminarily, Calabro and John Conforti make a broad attack on the conformity of the evidence with the offenses charged in the indictment. John contends that a Series E bond is not embraced within the wording of 18 U. S. C. § 495 and Calabro argues that the forgery of endorsements on otherwise genuine bonds does not violate that section. Neither contention has merit. Section 495 prohibits, *inter alia,* the making, alteration, forgery or counterfeiting of "any deed, power of attorney, order, certificate, receipt, contract, or other writing" for the purpose of obtaining money from the United States and the publishing or uttering of any such writing with intent to defraud the United States, knowing the false or forged nature of the paper. In *Prussian v. United States,* 282 U. S. 675 (1931) the Supreme Court held, under the predecessor to § 495, that an endorsement is a "writing" within the purview of that section. And a forged endorsement on an obligation such as a government savings bonds, if made "for the purpose of obtaining a sum of money from the Treasury of the United States," constitutes a violation of

§ 495. *Prussian v. United States, supra; United States v. Campo,* 414 F. 2d 765 (2d Cir. 1969). Each of the forgery counts charged that the endorsements were forged for the purpose of obtaining money from the United States and each of the uttering counts charged that the passing was done "with intent to defraud the United States, knowing the payee's name to be forged thereon." Hence the acts alleged and proved fell within the scope of § 495.

The conspiracy count, worded somewhat differently, charged a conspiracy to forge and utter bonds and money orders, known to have been forged, with intent to defraud the United States. Read literally, this does not charge a conspiracy to forge endorsements. *See Danielson v. United States,* 321 F. 2d 441, 444 (9th Cir. 1963). However, the evidence showed a conspiracy to forge bonds themselves as well as to forge endorsements on valid bonds. Some of the bonds supplied by Calabro and cashed by the group were blank and had to be completed and stamped to have even counterfeit validity. Despite the genuineness of the blanks from which the defendants worked, this process is a forgery of the bonds in violation of 18 U. S. C. § 471 which prohibits forging of an "obligation or security of the United States," and their uttering constitutes a violation of 18 U. S. C. § 472. *See United States v. Craft,* 407 F. 2d 1065 (6th Cir. 1969). Thus, a conspiracy to violate sections 471 and 472 was charged, even if we take a possibly overtechnical view and find that one under § 495 was not, and the evidence sustained the charges. The fact that the wrong section of the statute was cited does not invalidate either the charge or the convictions if, as here, no prejudice is shown to derive from the miscitation. *United States v. Hutcheson,* 312 U. S. 219, 229 (1941); *United States v. Galgano,* 281 F. 2d 908, 910-911 (2d Cir. 1960), *cert. denied sub nom. Carminati v. United States,* 366 U. S. 960 (1961); *United States v. Mc-*

Knight, 253 F. 2d 817, 820 (2d Cir. 1958); Rule 7(c) Fed. R. Crim. P.[3]

Calabro, who was convicted only on the conspiracy count, claims that though he may have been guilty of aiding the forging and uttering by selling bonds to Leonard and Graham, he did not conspire with the defendants to accomplish their aims. However, it is clear that his participation went deeper than the supplying of contraband in a few isolated transactions with no concern for the remainder of the operation. *See United States v. Peoni*, 100 F. 2d 401 (2d Cir. 1938). He was the supplier of most of the bonds the group cashed, and though he was paid for some irrespective of whether they were cashed, he often received a percentage of the proceeds. The forging and uttering were thus a prerequisite to his realization of profit. Both Marabetti and Graham, who personally received packages of bonds from Calabro, were told by Leonard that Calabro was his boss, and Calabro himself told Faye Rushford that Leonard and Insalaco "worked for him." There was ample evidence that Calabro was a key member of the ongoing conspiracy.

John Conforti claims that he was a "fringe" defendant who entered the conspiracy late and was only tangentially involved in the transactions that occurred after he began to participate. The evidence, as noted above, belies this

3. John claims that prejudice flowed from the use of § 495 on the substantive counts based on the blank savings bonds when those counts could as well have been brought under § 471. The claim is meritless for sections 471 and 472 bear higher penalties than does § 495. Roche and Leonard Conforti, who could have been charged with forging postal money orders under 18 U. S. C. § 500 rather than with forging endorsements and uttering orders with forged endorsements under § 495, would then have been exposed to a five-year as opposed to the ten-year maximum term they faced. However, Roche was only sentenced to five years, and Leonard received ten-year terms to be served concurrently with twenty-four other terms of equal length.

contention. In the early fall of 1968 he recruited Faye Rushford, telling her that the group cashed stolen bonds for a living, and he allowed his house to be used for the forging enterprise. In the late fall of 1968 and early winter of 1969, a period of particularly heavy cashing activity, John became Graham's partner and worked actively with the group. Thus, although John entered the conspiracy later than the others, the evidence was sufficient to sustain his conviction on the conspiracy count. His convictions on the substantive counts are also clearly sustainable. He assisted in the completion of the blank bonds the subject of counts 22 through 27 and received a share of the proceeds from their cashing; he aided and abetted the forging and uttering of the bonds listed in counts 14 and 15 by recruiting the woman who cashed them. On the other six counts on which he was convicted, the jury could have found him an aider and abettor because he was a member of the conspiracy at the time when the named bonds were passed. *Pinkerton v. United States*, 328 U. S. 640 (1946).

Tortorello also attacks the sufficiency of the evidence implicating him; he claims that even if the jury credited a statement by Graham that he was the source of twenty or more sets of false identification used to facilitate the passing of the bonds, there was no evidence that he knew when he supplied the papers that they would be used in bond-cashing activity. Under *United States v. Gallishaw*, 428 F. 2d 760 (2d Cir. 1970), the government had to show at a minimum, to sustain the conviction of Tortorello as an aider and abettor of the forging, that he knew that the identification he supplied the group was to be used in a transaction involving forged bonds. Though details of the actual cashing would not have to be known to him, a generalized suspicion of illegal use of the identification would not suffice.

The court properly instructed the jury on this point, noting that on each substantive count the jury must find that "the act of participation was done by the particular individual knowing it was for the purpose of furthering that particular venture set forth in the count" and that the requisite intent "must include the knowledge that it was for the purpose of forging or cashing" the bonds or money orders. Existence of this knowledge can be "inferred from the circumstances," *United States v. Gallishaw, supra,* 428 F. 2d at 763, and though the evidence on this point was not abundant, it was sufficient to allow the jury to conclude that Tortorello knew that cashing of illegal obligations was being accomplished with the false papers he sold the defendants. Leonard introduced Tortorello to Marabetti as "the Tortie that gives us the identification." Whenever the enterprise ran short of identification, Leonard would tell Roche to notify Tortorello and pick up more from him; the latter brought a batch of driver's licenses, Social Security cards and draft cards to Nero's Nook one night in July, 1968. At the time of one sale of identification directly to Marabetti Tortorello indicated that he was familiar with Calabro and knew that he had authorized the transaction. These circumstances could provide the basis for an inference that Tortorello was well acquainted with the appellants' activities and knew that their venture involved the cashing of forged obligations. *See United States v. Howell,* 447 F. 2d 1114 (2d Cir. 1971).

III. Multiple Conspiracies.

John and Calabro complain that the evidence showed multiple discrete conspiracies rather than the one charged in the indictment, and John claims that the court ought to have severed his trial from that of those involved in different agreements. The evidence, however, quite clearly

established one conspiracy, extending over a three-year period, to forge and pass savings bonds, money orders, and obligations of other sorts, including municipal bonds, through an on-going network. The method of operation, the participating individuals at the middle and upper levels, and the goals of the parties to the continuing agreement remained steady throughout. Leonard and Insalaco operated the business; Roche, Pasqua, Marabetti and Graham were middle level "employees" through the money order and bond phases of the group's activities. John occupied a position somewhere between the two groups, and Calabro was the supplier; though John became a member after the money order phase had terminated, and though Calabro did not supply the money orders, neither John's entry nor Calabro's resumption of supply activities after the money order hiatus marked a new agreement by the group or a change in method of operation. Though the "movers" who did the actual cashing came and went over the years, the basic network continued intact throughout the entire period.

This group of forgers in fact exhibited the characteristics of the typical "chain" conspiracy; although all of the defendants may not have known and worked directly with all the others, there is evidence that each was aware of others in the line of distribution and of the larger nature of the operation in which he or she played a part. *See* Note, Federal Treatment of Multiple Conspiracies, 57 Colum. L. Rev. 387, 390-92 (1957); *United States v. Borelli*, 336 F. 2d 376 (2d Cir. 1964). This is not a situation similar to that in *Kotteakos v. United States*, 328 U. S. 750 (1946) in which numerous individuals, unconnected and unconcerned with one another, were tied solely to each one's involvement with one Brown. Here, the appellants were members of a large organization which they had joined with knowledge of its goals and with an intent to further

them. John and Calabro were central members of this conspiratorial group.

Moreover, even if one concluded that two conspiracies were shown, one to forge postal money orders in the fall of 1967 and one of longer duration turning on savings bonds, John would not benefit thereby. "[T]he test for reversible error, if two conspiracies have been established instead of one, is whether the variance affects substantial rights. Fed. R. Crim. P. 52(a). *United States v. Agueci,* 310 F. 2d 817, 827 (2d Cir. 1962), *cert. denied,* 372 U. S. 959 (1963); *United States v. Vega,* 458 F. 2d 1234 (2d Cir. 1972). The requirements for sustaining a verdict in which there has been a variance have been met when there is no double jeopardy problem and no issue of unfair surprise deriving from the proof of two conspiracies rather than one (*Berger v. United States,* 295 U. S. 78 (1935)), and when "[t]he several conspiracies, if there had been such, could have been joined in a single indictment or consolidated for a single trial and the conduct of the trial was such that the danger resulting from the admission of evidence not chargeable to any appellant was minimal." *United States v. Agueci, supra,* 310 F. 2d at 827.

John claims that he did suffer prejudice from the inclusion of the postal money order conspiracy in his trial because it provoked testimony about the use of threats and physical force by Leonard on one of the money order "movers" to make clear to her that she was not free to cease working for him whenever she pleased. John also claims that proof on the money order counts distracted the jury from the counts and testimony in which he was involved. Proof on the money order counts, which comprised only two of the twenty-six substantive counts, did not unduly sidetrack the trial, and the fleeting reference to physical violence in a trial of a month's duration does not warrant a severance. Nor was John a peripheral de-

fendant, like Shuck in *United States v. Kelly*, 349 F. 2d 720 (2d Cir. 1965), *cert. denied*, 384 U. S. 947 (1966), whose connection to the overall conspiracy was so tenuous and different in quality from that of the main defendants that excessive care was necessary to avoid irreparable prejudice to him deriving merely from presence on trial with them. The trial court here took pains to explain to the jury the circumstances under which the evidence could be considered against one or more of the defendants and to avoid any prejudice to those defendants against whom certain facts were not admissible. We find no error based on a claim of the existence or proof of more than one conspiracy under the indictment.

IV. Alleged Denial of the Right to Assistance of Counsel.

The two most substantial arguments raised by the appellants arise from the alleged denial of assistance of counsel to Leonard Conforti and Joseph Calabro.

The factual background of Leonard's claim must be sketched in some detail. Conforti's retained attorney in a related case, James LaRossa, was to represent him at this trial, but when it became clear that he would be a crucial witness in a hearing on an alleged promise of immunity to Leonard, he was relieved by the court and Gerald Rosenthal was appointed to replace him. This substitution took place some time before trial, and the two had opportunities to talk about the defense in the interim. On the eve of trial, Rosenthal was appointed to represent John Conforti and his wife Loretta, named in one count dismissed at trial.

The conflict which led to Rosenthal's cessation of representation of Leonard grew out of Leonard's refusal to stipulate that the bonds named in certain counts of the indictment were in fact stolen and the signatures unau-

thorized. The government and all the other defendants and attorneys were willing, indeed anxious to do so, both to save time and to avoid highly prejudicial testimony. At the end of the first day of testimony by bondholders, Rosenthal announced to the court that Leonard was dissatisfied and wanted him removed from the case. Leonard objected, claiming that though they were having some difficulty, it was Rosenthal and not he who wished to sever the relationship. The court forbade Rosenthal to withdraw but advised the defendant that if he wished to dismiss his attorney he could do so and proceed pro se, with Rosenthal present to answer his questions. Rosenthal finally stated that he would insist on entering the stipulation were he to continue with Leonard and leave it to the client whether to accept to dismiss him for that reason. Leonard remained adamant in his refusal to stipulate, and the court announced that the testimony of bondholders would continue the next day and that Rosenthal would be present to represent Leonard.

The next morning Rosenthal reiterated that Leonard and now John wished to dismiss him. Leonard explained that Rosenthal's unwillingness to tell the court that it had been he who initiated the talk of dismissal, and his refusal to "properly defend" his client were the reasons for the request. Leonard told the court that he did not feel adequate to defend himself but that he would prefer that course to continuing with Rosenthal. The court denied Leonard's request for a half-day recess in which to obtain new counsel and gave him the choice of Rosenthal or self-representation. Leonard, followed by John and Loretta, chose the latter. The court did not discuss the matter further at that time, but told them they would have every courtroom right an attorney has and "one additional right, the right to make a fool of yourself by not having a lawyer." The trial proceeded.

Early the next morning Leonard, having contacted another lawyer but failed to persuade him to take the case on such short notice, requested that the court appoint new counsel for him. Judge Mishler refused, citing the inevitable delay that would follow the entry of new assigned counsel into the case. When no other defense attorney present volunteered to represent the Confortis, the court insisted that it was Rosenthal or no one.[4] John and Loretta then accepted the reassignment of the attorney; Leonard chose to continue pro se. After he had conducted what could only be described as a disastrous cross-examination of one of the female witnesses, the court advised Leonard of some of the difficulties of pro se defense and reminded him of his continuing offer to reassign Rosenthal. Leonard refused the attorney's services and did a creditable job of representing himself throughout the remainder of the trial, conferring with Rosenthal and other attorneys when necessary.

Leonard really makes two claims—that he did not effectively waive the assistance of counsel and that the court erred in refusing to assign new counsel or to allow Leonard time to locate an attorney on his own. He claims that he made no "clear cut election" to waive his constitutional right to assistance of counsel because his request that Rosenthal withdraw did not follow "a full and calm discussion between the judge and the defendant" (*United States v. Spencer*, 439 F. 2d 1047, 1050 (2d Cir. 1971)) with emphasis on "the risks, pitfalls, and complexities inherent in [pro se representation] and the serious consequences of

4. The possibility that Leonard would agree to have Rosenthal reassigned had been lessened the previous afternoon when the attorney had mentioned to the court a fee dispute that he and Leonard were having in another case, thus suggesting that Leonard's claims of indigency were less than genuine. This apparent discrepancy in financial condition was explained to the court's satisfaction, however, and by this time (the morning of the second day of self-representation) Rosenthal had expressed his willingness to defend the Confortis vigorously if they would accept his reassignment.

conviction," *United States v. Duty*, 447 F. 2d 449, 451 (2d Cir. 1971). Although it is true that the trial court did not, at the moment of Leonard's request, discuss as fully as would have been desirable the consequences of his acts, we are convinced that Leonard intelligently and knowingly waived his right to counsel "even without such a caveat." *United States v. Duty, supra*, 447 F. 2d at 451.

The decision on whether a defendant has effectively waived his Sixth Amendment right to counsel depends "in each case, upon the facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938). The factors that this court has considered in making that determination are "whether the defendant understood that he had a choice between proceeding pro se and with assigned counsel, whether the defendant understood the advantages of having one trained in the law to represent him, and whether the defendant had the capacity to make an intelligent choice." *United States v. Spencer, supra*, 439 F. 2d at 1050. The fact that the defendant's pro se representation turned out to be inadequate and ineffective is irrelevant to the issue of whether the waiver of his right to counsel was knowingly or intelligently made, but it is important that the court consider whether the defendant affirmatively made a choice or whether he proceeded alone only because he felt "he had no choice" and thus did not effectively waive his right. *See United States ex rel. Higgins v. Fay*, 364 F. 2d 219 (2d Cir. 1966); *United States v. Curtiss*, 330 F. 2d 278 (2d Cir. 1964). The trial court must make a "record sufficient to establish to our satisfaction that the defendant 'knows what he is doing and his choice is made with eyes open.' *United States v. Plattner*, 330 F. 2d 271, 276 (2d Cir. 1964)." *United States ex rel. Higgins v. Fay, supra*, at 222.

The record here makes clear that under this test for intelligent waiver Leonard did choose to forego Rosenthal's assistance. When he stated that he no longer desired the services of the attorney, the court conveyed to him the danger and folly of proceeding alone. And during the second day of self-representation, the court warned him more explicitly of the perils of cross-examination by one not seasoned by trial work. The court also had ample time to observe Leonard and to assess his capacity to choose pro se defense, and we concur in his conclusion that Leonard was intelligent and well understood the consequences of his acts. Though he expressed his own sense of inability to defend himself effectively, he willingly proceeded alone, preferring his own limitations to those he felt Rosenthal possessed.[5]

As a subsidiary or alternative to the waiver argument, Leonard urges that Rosenthal deserted him rather than the reverse, by stating that he intended to enter into the stipulation contrary to his client's wishes. Leonard's claim that this was an improper act which justified the dismissal is unfounded. The American Bar Association Project on Standards for Criminal Justice concludes that a defendant is entitled to make the ultimate decision only in regard to whether to plead guilty, whether to waive a jury, and whether to testify; "all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client." Standards Relating to the Prosecution Function and the Defense Function, approved draft 1971, The Defense Function § 5.2. The decision on "whether to stipulate to certain facts" falls into the latter

5. The trial court, once Leonard had waived counsel, followed the practice approved in *United States v. Spencer, supra,* of offering the defendant the assistance of Rosenthal as a resource to answer questions and give advice should the defendant request it. Rosenthal was always present in the courtroom during trial, and Leonard apparently conferred with him and other defense attorneys on occasion.

category. *Id.* p. 240; *see People v. Woods,* 23 Ill. 2d 471, 179 N. E. 2d 11 (1961). *See generally United States v. Main,* 443 F. 2d 900 (9th Cir. 1971), *cert. denied* 404 U. S. 958 (1972); *United States v. Gutterman,* 147 F. 2d 540 (2d Cir. 1945).

In any case, the trial judge refused to allow Rosenthal to withdraw because of this difference over strategy and Rosenthal expressed his willingness to resume representation of Leonard even should he persist in his refusal to stipulate. The trial judge, present in the courtroom and aware of nuances which the record cannot convey, was persuaded, we think reasonably, that Leonard was "determined to take charge of his defense, with and without a lawyer"; he now "has no just reason to complain of lack of counsel" (*Glenn v. United States,* 303 F. 2d 536, 540-41 (5th Cir. 1962), *cert. denied sub nom. Everitt v. United States,* 372 U. S. 920 (1963)) for this was "a situation for which he was intentionally and knowingly responsible." *Kates v. Nelson,* 435 F. 2d 1085, 1088 (9th Cir. 1970).

The second branch of Leonard's argument, closely entwined with the first, is that the court ought to have assigned new counsel once Leonard had dismissed Rosenthal. Once trial has begun, however, a defendant does not have the unbridled right to reject assigned counsel and demand another. *United States v. Burkeen,* 355 F. 2d 241 (6th Cir.), *cert. denied sub nom. Matlock v. United States,* 384 U. S. 957 (1966); *United States v. Paccione,* 224 F. 2d 801 (2d Cir.), *cert. denied,* 350 U. S. 896 (1955). A defendant with assigned counsel cannot decide for no good cause on the eve or in the middle of trial that he will have another attorney represent him. *Cf. United States v. Abbamonte,* 348 F. 2d 700 (2d Cir. 1965), *cert. denied,* 382 U. S. 982 (1966) (retained counsel). While courts must be assiduous in their defense of an accused's right to counsel, that

right "may not be manipulated so as to obstruct the orderly procedure of the courts or to interfere with the fair administration of justice." *United States v. Bentvena*, 319 F. 2d 916, 936 (2d Cir.), *cert. denied sub nom. Ormento v. United States*, 375 U. S. 940 (1963); *see United States v. Terry*, 449 F. 2d 727 (5th Cir. 1971); *United States v. Llanes*, 374 F. 2d 712 (2d Cir.), *cert. denied*, 388 U. S. 917 (1967).

In order to warrant a substitution of counsel during trial, the defendant must show good cause, such as a conflict of interest, a complete breakdown in communication or an irreconcilable conflict which leads to an apparently unjust verdict. *Brown v. Craven*, 424 F. 2d 1166 (9th Cir. 1970); *United States v. Grow*, 394 F. 2d 182, 209 (4th Cir.), *cert. denied*, 393 U. S. 840 (1968); *United States v. Gutterman*, 147 F. 2d 540 (2d Cir. 1945). If a court refuses to inquire into a seemingly substantial complaint about counsel when he has no reason to suspect the bona fides of the defendant, or if on discovering justifiable dissatisfaction a court refuses to replace the attorney, the defendant may then properly claim denial of his Sixth Amendment right. *Brown v. Craven, supra.* In the absence of a conflict which presents such a Sixth Amendment problem, the trial court has discretion to decide whether to grant a continuance during the course of trial for the substitution of counsel, and that decision will be reversed only if the court has abused its discretion. *United States v. Main, supra; United States v. Grow, supra.*

In this case, we conclude that Leonard had no justification for his request for new counsel. Rosenthal's action regarding the stipulation was not improper, and he showed himself willing to accommodate to his client's strongly felt wishes. The attorney had been assigned before trial, and the two had discussed the case; there was no inability to

communicate. Nor was the verdict unjust. We therefore find that the trial court, which may have been only too aware that a decision to honor Leonard's request would not only delay a complex trial but would produce a rash of dissatisfaction with lawyers on the part of the other defendants, did not abuse its discretion in denying Leonard's request.

Leonard calls our attention to the recent case of *United States v. Morrissey*, 461 F. 2d 666 (2d Cir. 1972) but that case is readily distinguishable and only strengthens our conclusion. There, Morrissey had petitioned the court four times before trial for a substitution of counsel. An adjournment to effect a change of counsel would not have engendered as much delay as had already occurred through no fault of the defendant. The defendant gave reasons for his wish which, if true, would have been good cause for a change of attorney. In this case, the first sign of dissatisfaction came during trial, revolved around an issue of trial strategy which was easily resolved, and was probed by the court, conscious of the inevitable delay a switch would entail. The court's conclusion in *Morrissey* is peculiarly apt here: "In sum, the record as a whole indicates that [Leonard's] reasons for a change of counsel were insubstantial. Thus, the trial court's proposed alternative to [Leonard] of representing himself or continuing with [Rosenthal] as counsel was proper." *United States v. Morrissey, supra*, 461 F. 2d at 670.

Pasqua, Roche, Picciano, Moskowitz, and John Conforti claim that as a result of Leonard's antics the jury could only have viewed the trial as a "macabre charade" and that his pro se defense made it impossible for them to obtain a fair trial. They claim that the trial court erred in denying their repeated requests for severance and mistrial. The nub of their complaint is that through inept questioning on cross-examination and incessant flamboy-

ance and posturing Leonard revealed damaging facts and brought out relationships among the female witnesses and the defendants, knowledge of which created jury compassion for the witnesses and ill will toward the defendants.

Motions for severance and mistrial are directed to the sound discretion of the trial court. *Opper v. United States*, 348 U. S. 84 (1954); *United States v. Marshall*, 458 F. 2d 446 (2d Cir. 1972); *United States v. Kompinski*, 373 F. 2d 429 (2d Cir. 1967); *United States v. Bentvena, supra.* Before a defendant is entitled to severance he must show that substantial prejudice derives from the joint trial and not merely that he would have had a better chance of acquittal were he tried separately. *United States v. Borelli*, 435 F. 2d 500 (2d Cir. 1970), *cert. denied*, 401 U. S. 946 (1971); *United States v. DeSapio*, 435 F. 2d 272 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971); Note, Joint and Single Trials under Rules 8 and 14 of the Federal Rules of Criminal Procedure, 74 Yale L. J. 553, 562-66 (1965).

Tested against this standard. it is clear that the decision of the court below was correct. The inquiries on cross-examination, none of which was objected to in an attempt to halt Leonard's ill-advised course, were not as likely to cause spill-over prejudice as the disruptive outbursts in *United States v. Bentvena, supra; United States v. Marshall, supra;* and *United States v. Aviles*, 274 F. 2d 179 (2d Cir.), *cert. denied sub nom. Genovese v. United States*, 362 U. S. 974 (1960); the fit thrown by the insane co-defendant in *Brown v. United States*, 375 F. 2d 310 (D. C. Cir. 1966), *cert. denied*, 388 U. S. 915 (1967); or the presence of the manacled co-defendant in *McDonald v. United States*, 89 F. 2d 128 (8th Cir.), *cert. denied*, 301 U. S. 697 (1937), none of which was held to warrant severance or mistrial. Nor did any appellant here request ameliorative instructions which might have been appropriate. The difficulties of

which these five defendants complain are not essentially different from those which any defendant might suffer in a joint trial if the efforts of counsel are not coordinated. *See, e.g., United States v. DeSapio, supra,* 435 F. 2d at 280-81. The denial of the motions for severance and mistrial was not an abuse of discretion.

Calabro's Sixth Amendment claim arose from an incident which occurred on the last day of trial, while the jury was deliberating into the evening. His attorney became ill in the courtroom and was taken to a hospital at approximately 10:45 p.m. The court then discussed the singular situation with Calabro, who expressed uncertainty about whether another attorney could competently represent him at that point. The court stated that he thought it would be fair for another to assume his defense temporarily but Calabro refused to make any decision, claiming that he "couldn't say" what ought to be done; he "didn't know really." Then, without requesting another defense attorney to represent Calabro for the remainder of the evening, the court allowed the proceedings to continue. During the absence of the attorney, the court received a note from the jury and delivered a supplemental charge to them. Shortly thereafter, at 11:20 p.m., the jury returned with its verdict, finding Calabro guilty on the conspiracy count and the others guilty, as set out in n. 1. The court polled the jury on the verdict. Before adjourning, the court advised Calabro to retain other counsel before the date of sentencing.

Calabro claims that this period of time during which he was unrepresented was a "critical stage" of the proceedings during which he had a right to counsel, and that he was therefore denied his constitutional rights under the Sixth Amendment. *Johnson v. Zerbst,* 304 U. S. 458 (1938). The government suggests preliminarily that Calabro effec-

tively waived his right to counsel by evasively refusing to answer the court directly but in making clear that he chose to proceed alone. We cannot find on the basis of the inconclusive conversation sketched above that the court clearly explained to Calabro his right to counsel and the possibility of his representing himself temporarily. Calabro seems to have been purposely unwilling to commit himself, but the court did not ask him pointblank which course of action he wished to take. Given the presumption against waiver of his fundamental constitutional right, we cannot conclude that Calabro knowingly and voluntarily waived the assistance of counsel.

However, in the particular circumstances present here, we conclude that Calabro was not exposed to any "reasonable possibility of prejudice in fact" (*McGill v. United States*, 348 F. 2d 791 (D. C. Cir. 1965), that no prejudice accrued to him as a result of the hour without counsel, and that the error was a harmless one.[6] First, the question put by the jury in its note was a repetition of an earlier question, asking whether a defendant could be acquitted on the conspiracy count and be convicted on any of the substantive charges. Unlike most of the other defendants, Calabro was charged only with conspiracy. Therefore, "the jury's question and the judge's answer had nothing whatever to do with the case against [him] or with his defense." *Walker v. United States*, 322 F. 2d 434, 436 (D. C. Cir. 1963), *cert. denied*, 375 U. S. 976 (1964). Despite this fact, his attorney had been given an opportunity when the question was first asked to object to the suggested

6. "The general language in *Johnson v. Zerbst* and Rule 44 must be read in light of their fundamental purpose to provide the guiding hand of counsel at every step where an accused who is without counsel may be prejudiced. . . . The exaltation of abstraction above reality should not be condoned for the purpose of denying constitutional rights and should not be indulged for the purpose of creating constitutional rights." *McGill, supra*, at 793.

response and to offer language which the court adopted as part of its answer. He had then expressly found the answer unobjectionable. The repetition of the answer to this question could not have prejudiced Calabro.[7]

It is equally clear that there was no possibility of prejudice to Calabro because of his attorney's absence when the verdict was returned. *Martin v. United States,* 182 F. 2d 225 (5th Cir.), *cert. denied,* 340 U. S. 892 (1950); *see McGill v. United States, supra; cf. Newagon v. Swope,* 183 F. 2d 340 (9th Cir. 1950), *cert. denied,* 340 U. S. 921 (1951). The court here polled the jury on its own motion and thus removed the possibility of prejudice deriving from absence of polling which disturbed the court in *Thomas v. Hunter,* 153 F. 2d 834 (10th Cir. 1946). In *United States v. Smith,* 411 F. 2d 733 (6th Cir. 1969), the court found that even if the jury were polled, prejudice might creep in because counsel was not present to discern hesitancy of juror responses or other facts with "significant meaning." In that case, however, the defendant was tried alone; here the numerous attorneys whose clients' interests in the polling of the jury were identical to Calabro's insured against such a possibility. In *Smith,* also, the court did not discuss the situation with the defendant at all. *See United States v.*

7. This case is readily distinguishable from *United States v. Glick,* slip op. 3821 (2d Cir. June 29, 1972) in which the court delivered supplementary instructions to the jury outside the presence of the appellant (appearing pro se) and the attorney for his co-defendants. The instruction was not only directly relevant to the appellant's case, but was misleading and highly prejudicial. The court there found, as has been held in numerous other recent cases under Fed. R. Crim. P. 43 (which requires the presence of the defendant at all stages of the proceeding) that the defendant must show some prejudice or possibility of prejudice before a conviction will be set aside on the ground that the defendant, and often his attorney too, were absent during communication by the court with the jury. *See United States v. Arriagada,* 451 F. 2d 487 (4th Cir. 1971); *United States v. Howard,* 433 F. 2d 1 (5th Cir. 1970); *United States v. Schor,* 418 F. 2d 26 (2d Cir. 1969); *Ware v. United States,* 376 F. 2d 717 (7th Cir. 1967).

Clayton, 418 F. 2d 1274 (6th Cir. 1969), *cert. denied*, 399 U. S. 931 (1970). Though Calabro did not clearly waive counsel, the court did outline the situation to him and make it clear that he could get another attorney. This must have alerted him to be protective of his rights in the short period during which he was unrepresented. We therefore find the case distinguishable from *Smith*, but to the extent it is not, we decline to follow that holding. We therefore find no reversible error based on Calabro's short period without counsel. *See United States v. Moher*, 445 F. 2d 584 (2d Cir. 1971); *Dallago v. United States*, 427 F. 2d 546 (D. C. Cir. 1969); *United States v. Murphy*, 413 F. 2d 1129, 1140-41 (6th Cir.), *cert. denied*, 396 U. S. 896 (1969); *cf. Chin Kee v. Commonwealth*, 407 F. 2d 10 (1st Cir.), *cert. denied*, 395 U. S. 982 (1969).

The defendants raise numerous other points, none of which has merit. The court had reasonable non-hearsay grounds for finding the existence of a conspiracy and admitting the hearsay evidence of co-conspirators against the others. The evidence on passing of municipal bonds and other obligations was admissible either to show "similar acts" and mode of operation or as part of the same conspiracy charged in the indictment, although we note that it might have been wise to exclude it given the other clear and overwhelming evidence of the group's activities.

Finding, therefore, none of the claims made by appellants sufficient to warrant reversal, we affirm their convictions and refuse to disturb the verdict below.

(2) JUDGMENT OF THE COURT OF APPEALS.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of September one thousand nine hundred and seventy-two.

Present: HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
HON. WILLIAM H. TIMBERS,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH CALABRO, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

R. DANIEL FUSARO,
Clerk.

(3) ORDERS DENYING REHEARING.

[Caption omitted.]

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for appellant Joseph Calabro.

Upon consideration thereof, it is

Ordered that said petition for rehearing be and it hereby is DENIED and it is further

Ordered that mandate be stayed in the case of Joseph Calabro and that he be continued on bail pending application for certiorari, under the conditions of Fed. R. App. P. 41(b).

LEONARD P. MOORE,
J. JOSEPH SMITH,
WILLIAM H. TIMBERS,
Circuit Judges.

October 30, 1972

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, Joseph Calabro, and no active circuit judge having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

HENRY J. FRIENDLY,
Chief Judge.

October 30, 1972

(4) MEMORANDUM OPINION OF DISTRICT COURT DENYING MOTION TO SET ASIDE VERDICT.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

70-CR-152.

UNITED STATES OF AMERICA

—against—

JOSEPH CALABRO,

Defendant.

MEMORANDUM OF DECISION AND ORDER.

February 18, 1972.

Defendant Joseph Calabro moves to vacate the guilty verdict on a conspiracy charge rendered on January 28, 1972 at about 11:30 P. M. on the ground that the defendant did not have the assistance of his retained counsel at the time the court gave an instruction in answer to the jury's question at about 10:50 P. M. and when the verdict was returned.

The trial of this action commenced on January 3, 1972 on an indictment containing 28 counts against 12 defendants represented by six lawyers. Two defendants pleaded guilty during the trial and the indictment was dismissed against one defendant, i.e., Loretta Conforti. At the time the court charged the jury, there remained 27 counts and nine defendants represented by five lawyers in addition to

Leonard Conforti's pro se defense. The charge was completed about 11:30 A. M. on January 28, 1972 and the jury commenced its deliberation soon thereafter. Defendant Calabro was charged only with conspiracy to violate 18 U. S. C. § 495 (Count I). Some defendants who were charged with conspiracy to violate 18 U. S. C. § 499 were also charged with aiding and abetting the commission of the substantive crimes (Counts 2 to 27, both inclusive).

During the jury's deliberations at about 9:00 P. M. the court received a note from the jury asking (Trans. p. 4420)

> "Is it possible to find the defendant innocent on the conspiracy charges and guilty on some of the substantive charges."

After the court gave the supplemental charge in response to the question, it inquired as to whether there were any objections (Trans. p. 4422). Mr. Sonnenshine, attorney for defendant Tortorello, asked the court to give a revised charge. The court then specifically asked Mr. Aronstein whether he was satisfied with the charge suggested by Mr. Sonnenshine (Trans. pp. 4429-30).

Mr. Aronstein then asked the court to charge the jury on aiding and abetting and that ". . . every crime here constitutes a separate and distinct crime as if incorporated in just one count and one indictment. Each crime stands or falls—each substantive crime stands or falls—on its own two feet."

The court again gave another supplemental charge in answer to the question above set forth. The court turned to Mr. Aronstein and asked (Trans. p. 4434):

> "I am asking a specific question. Do you take further exception or objection to the supplemental charge?"

To which Mr. Aronstein responded: "I don't".

At almost 10:30 P. M., Mr. Aronstein fell ill. Medical assistance was called. He received emergency treatment in the courtroom and was taken to L. I. College Hospital. In the meantime the court received another note from the jury. It read:

> "There is still some confusion re whether or not a person can be found not guilty in the conspiracy charge while at the same time be found guilty in some of the substantive charges."

Court reconvened about 10:45 P. M. The court noted that Mr. Aronstein had taken ill and was unavailable. The following transpired (Trans. p. 4434-5):

> The Court: I do not know what effect this has on the defendant Calabro.
>
> Mr. Coonan: Your Honor, at this point I would suggest it is up to Mr. Calabro whether he would be adequately represented by another attorney to present the material that the jury requires.
>
> The Court: Do you want to answer that question, Mr. Calabro?
>
> The Defendant Calabro: The best way I can. Does the court feel it is fair if I had another attorney at this point . . . at this time.
>
> The Court: Sure I do. There may be nothing else for an attorney to do but take the verdict.
>
> The Defendant Calabro: That's the court's decision but it isn't mine.
>
> The Court: What is yours?
>
> The Defendant Calabro: I couldn't say. Joe has been with us for four weeks. I don't really know.

> The Court: All right. I have your opinion. I certainly would not sever on that statement, Mr. Coonan, because you are bound to have a double jeopardy claim.

Thereupon the jury re-entered the courtroom and the court gave a third supplemental charge on the same issue. Bearing in mind Mr. Aronstein's previous request (at Trans. pp. 4429-30), the court started the supplemental charge as follows:

> "I again answer that question, 'Yes'. I started my charge earlier this morning by telling you that the jury should consider the evidence as it relates to each charge and judge each charge as if it were a separate case . . ."[1]

The court continued by advising the jury that in the absence of a finding of guilt of conspiracy, the Government had to prove all the essential elements of the crime charged beyond a reasonable doubt and prove that the accused wilfully aided and abetted in the commission of the crime charged.

The jury retired and soon thereafter at 11:20 P. M. advised the court that they reached a verdict. The jury found defendant and seven co-defendants guilty of conspiracy to violate 18 U. S. C. § 495. It found defendant Tortorello not guilty of conspiracy. The jury found defendant Tortorello not guilty in counts 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21. It found the defendant Tortorello guilty in counts 22, 23, 24, 25, 26 and 27.

The court polled the jury (Trans. p. 4452) and asked:

> "Is there any motion or motions that any individual wants to make before I dismiss the jury?"

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1. The affidavit in support of this motion now finds error in this charge.

Defendants indicated there were none.

The defendant declined the assistance of other counsel. It was clear to the court that defendant insisted on Mr. Aronstein's assistance and would have no other—knowing of course that Mr. Aronstein was unavailable. A ritualistic instruction on the right to counsel and the availability of assigned counsel would have added nothing. The "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights. *Johnson v. Zerbst,* 304 U. S. 458, 463, 58 S. Ct. 1019, 1023 (1938) quoting from *Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U. S. 292, 307, 57 S. Ct. 724, 731 (1937). Defendant Calabro effectively waived the assistance of counsel.

Defendant makes a vain attempt to show prejudice arising from the lack of assistance of counsel. No possible prejudice could have resulted. The narrow question here is whether prejudice need be shown.

Johnson v. Zerbst, supra, at p. 463 (S. Ct. at p. 1022) pointed to the need for "experienced and learned counsel" in criminal proceedings that appear to the layman to be "intricate, complex and mysterious". The Court quoted with approval from *Powell v. Alabama,* 287 U. S. 45, 68, 53 S. Ct. 55, 63 (1932) in part as follows:

> ". . . Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him."

The Sixth Amendment right to ". . . the assistance of Counsel for his defense." as generally defined in *Johnson v. Zerbst,* supra, was further explicated in *Mempa v. Rhay,* 389 U. S. 128, 88 S. Ct. 254 (1967). Mempa held that the

Sixth Amendment right to counsel extended to a deferred sentencing procedure as provided by the State of Washington whether it be labelled ". . . a revocation of probation or a deferred sentencing." In further explicating the Sixth Amendment right to counsel "at every step in the proceedings . . .", the Court said (at p. 134 [S. Ct. at pp. 256-7]):

> "There was no occasion in *Gideon*[1] to enumerate the various stages in a criminal proceeding at which counsel was required, but *Townsend*,[2] *Moore*,[3] and *Hamilton*,[4] when the *Betts*[5] requirement of special circumstances is stripped away by *Gideon*, clearly stands for the proposition that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected. The Constitution does not require '. . . the presence or assignment of counsel at a point when and where there is no reasonable possibility of prejudice to the rights or positions of an accused.' *McGill v. U. S.*, 348 F. 2d 791, 793 (D. C. Cir. 1965)."[6]

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1. Gideon v. Wainwright, 372 U. S. 335, 83 S. Ct. 792 (1963).

2. Townsend v. Burke, 344 U. S. 736, 68 S. Ct. 1252 (1948).

3. Moore v. State of Michigan, 355 U. S. 155, 78 S. Ct. 191 (1957).

4. Hamilton v. State of Alabama, 368 U. S. 152, 82 S. Ct. 157 (1961).

5. Betts v. Brady, 316 U. S. 455, 62 S. Ct. 1252 (1962).

6. C. f. U. S. v. Smith, 411 F. 2d 733 (6 Cir. 1969). Assigned counsel fell ill and was unable to be present and the district judge was so advised at the time the jury informed the court it had reached a verdict. The court informed the defendant that his lawyer ". . . can't be with you this morning." The jury returned a guilty verdict on 21 counts including embezzlement of mail, and stealing and destroying post office property. The court phrased the issue and the answer as follows:

> ". . . we find it necessary to discuss only one issue: Is the involuntary absence of the defendant's attorney at the time when the jury verdict is returned a violation of the Sixth Amendment right to counsel? Under the circumstances of this case we answer the question in the affirmative." (at p. 735)

Applied to the facts of this case, the court concludes that the absence of counsel was not a violation of defendant's Sixth Amendment right. The question by the jury and the answer by the court had previously been asked and answered while counsel was present and the return of the verdict was of "minor legal significance" under the circumstances. *Martin v. U. S.*, 182 F. 2d 225 (5 Cir. 1950) cert. denied 340 U. S. 892, 71 S. Ct. 200.

The court notes a paucity of authority on the significance of the absence of counsel at the time of return of verdict. The court's research has revealed only *Martin v. U. S.*, supra, and *U. S. v. Smith*, supra. The absence of counsel during a supplemental charge in answer to a jury's question is the graver consideration. Had the inquiry been made for the first time while defendant was without counsel and substantially affecting the charge against defendant, in the absence of waiver the verdict could not withstand constitutional challenge. Under the facts of this case, there is no reasonable possibility of prejudice by reason of counsel's involuntary absence at the time of the supplemental charge and verdict. The motion to vacate the verdict is denied, and it is

So Ordered.

Jacob Mishler,
U. S. D. J.